UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CHRISTIAN MUMME,	)	
	)	
Plaintiff	)	
	)	
v.	)	**Civil no. 00-98-B**
	)	
DEPARTMENT OF LABOR, et al.,	)	
	)	
Defendant	)	

ORDER AND MEMORANDUM OF DECISION

SINGAL, District Judge

Before the Court is Plaintiff's Motion to Set Aside the Court's Order dated September 21, 2000 and Defendant's Motion to Dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). For the reasons discussed below, and Plaintiff's Motion to Set Aside is DENIED and Defendants' Motion to Dismiss is GRANTED.

I. BACKGROUND

Plaintiff, Christian Mumme, appearing pro se, has brought suit against Defendants, the United States Department of Labor, and the head of that department, Secretary Alexis Herman. A federal employee, Mumme challenges the constitutional validity of certain provisions of the Federal Employees' Compensation Act ("FECA"), 5 U.S.C. §§ 8101-8193, and numerous regulations adopted by the Department of Labor.[1]

It appears that Mumme served process on the United States on June 5, 2000, but

[1] Plaintiff's Complaint does not make clear that Mumme is a federal employee; Defendants' Motion to Dismiss explains that Mumme is employed by the United States Customs Service.

the Government failed to respond within 60 days. Mumme moved for entry of default and default judgment on August 9, 2000, the same day that Defendants filed both a motion to extend time for filing responsive pleadings and the Motion to Dismiss. On September 12, 2000, the Magistrate Judge issued an Order denying an entry of default and denying default judgment, because good cause existed to set aside any entry of default and because Mumme failed to meet the requirements for obtaining default judgment against the United States pursuant to Fed. R. Civ. P. 55(e). (See Order Den. Pl.'s Am. Mot. for Default and Granting Def.'s Mot. to Extend Time, (Docket #10).) Thereafter, Mumme moved for reconsideration of the September 12th Order.[2] The Magistrate Judge denied that motion on September 21, 2000. Mumme now moves for the Court to set aside that September 21st Order and enter both default and default judgment against Defendants.[3]

II. PLAINTIFF'S MOTION TO SET ASIDE ORDER

A. Standard of Review

[2] Mumme also moved to extend time to respond to the Government's Motion to Dismiss and for the recusal of Magistrate Judge Margaret J. Kravchuk. By filing a response brief to the Motion to Dismiss, the motion for an extension of time was mooted. The Magistrate Judge denied the motion for recusal.

[3] Plaintiff asks the Court to "reinstate Plaintiff's entry of default", however, default has not yet been entered in this case. (Pl.'s Obj. and Mot. to Set Aside Sept. 21st Order ¶ 4, (Docket #18).) Liberally interpreting Plaintiff's motion, the Court reads this to mean that Plaintiff seeks both entry of default and default judgment. It is important to distinguish between "default" and "default judgment," which are distinct. Default is the first step toward a default judgment. Despite Plaintiff's contentions to the contrary, entry of default is "purely a clerical act", as the Magistrate Judge correctly stated in the September 12th Order. (Order Den. Pl. Am. Mot. for Default and Granting Def. Mot. to Extend Time at 2 n. 2, (Docket #10).) See Coon v. Grenier, 867 F.2d 73, 76 (1st Cir. 1989) (noting that entry of default is a "clerical act" and not a final judgment) (citing Phillips v. Weiner, 103 F.R.D. 177, 179 (D. Me. 1984)). For example, once a defendant misses the deadline to file a responsive pleading, "and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default." Fed. R. Civ. P. 55(a). After the clerk has entered default on the docket, the plaintiff may seek default judgment according to Fed. R. Civ. P. 55(b). If the defendant happens to be the United States or one of its agencies or officers, then that plaintiff would also have to meet the criteria of Fed. R. Civ. P. 55(e).

In his argument for default judgment, Plaintiff argues that it was improper for the Magistrate Judge to issue orders regarding default because default judgment is a dispositive matter within the meaning of Fed. R. Civ. P. 72(b). Rule 72(a) allows a magistrate judge to render orders on nondispositive matters, and such orders are valid unless found to be "clearly erroneous or contrary to law" by the district court judge. Rule 72(b) outlines the procedure by which a magistrate judge may issue a recommended decision on a dispositive matter, which the district court judge may accept, reject or modify after "de novo" review. See also 28 U.S.C. § 636(b)(1)(A) (listing eight examples of dispositive matters).

Thus, the question is whether denial of a motion for default judgment is a dispositive matter. If denial of default judgment is dispositive, the Court must treat the September 21st Order as a recommended decision and review it de novo; if denial of default judgment is not dispositive, then the Court must review the Order under the "clearly erroneous or contrary to law" standard. See Fed. R. Civ. P. 72(a).

Based on the First Circuit's decision in Phinney v. Wentworth Douglas Hosp., 199 F.3d 1 (1st Cir. 1999), the Court finds that the denial of default judgment is not dispositive. See id. at 4-6. In Phinney, one of the defendants committed discovery abuses, so the plaintiff moved for sanctions pursuant to Fed. R. Civ. P. 37. See id. at 2-3. The motion for sanctions could have yielded a variety of remedies, including default judgment against the defendant. See id. at 4-6. Granting the motion, the magistrate judge ordered the wayward defendant to pay a sizable monetary sanction. See id. at 3. The defendant objected to the sanction, which the district court judge approved after clear-error review. See id. On appeal, the defendant argued that because the motion

could have lead to default judgment, the district court should have treated the imposed sanction as a dispositive matter subject to de novo review. See id. at 4-5.

Rejecting this argument, the First Circuit held that motions for sanctions generally are not dispositive. See Phinney, 199 F.3d at 6.[4] If a magistrate judge, however, does impose a sanction that "fully disposes of a claim or defense", then that disposition constitutes an exception to the general rule, triggering the de novo review requirements of Rule 72(b). See id. Even though the magistrate judge in Phinney could have entered default judgment against the defendant, he did not do so, and therefore, the sanction was not dispositive. See id. Thus, the magistrate judge's order fell within Rule 72(a) and was only subject to clear-error review. See id.

The Court applies Phinney to the instant case. Although Phinney dealt with motions for sanctions under Rule 37, the potential imposition of default judgment for discovery violations mirrors the application of default judgment for tardiness pursuant to Rule 55. Whether via Rule 37 or Rule 55, default judgment is a tool that courts have the discretion to use against errant parties.

Furthermore, the procedural background of Phinney resembles that of the present case. Even though the plaintiff in Phinney moved for sanctions – potentially including default judgment – the magistrate judge in that case chose not to impose default judgment; even though the within Plaintiff moved for default judgment, the Magistrate Judge of this Court chose not to impose default judgment against Defendants. The Order

[4] Other circuits have disagreed on this issue. Compare, e.g., Gomez v. Martin Marietta Corp., 50 F.3d 1511, 1519-20 (10th Cir. 1995) ("Even though a movant requests a sanction [for discovery misconduct] that would be dispositive, if the magistrate judge does not impose a dispositive sanction the order falls under Rule 72(a) rather than Rule 72(b)."), and Maisonville v. F2 America, Inc., 902 F.2d 746, 748 (9th Cir. 1990) (holding that imposition of Rule 11 sanctions is not dispositive), with Alpern v. Lieb, 38 F.3d 933, 935 (7th Cir. 1994) (holding that a district judge many not refer a dispute regarding Rule 11 sanctions to a

denying default judgment did not fully dispose of this case, and therefore, Rule 72(a) applies, rather than Rule 72(b). Thus, the Court reviews the September 21st Order under the "clearly erroneous or contrary to law" standard.

B. Discussion

Applying clear-error review to the September 21st Order, this Court finds no clear error. First, the Magistrate Judge correctly found that if the clerk entered default – which the clerk had not done – then good cause existed to set aside such an entry of default pursuant to Rule 55(c). Plaintiff argues that the Magistrate Judge's finding of good cause is flawed because the Magistrate Judge did not look to the list of possible reasons for setting aside judgments in Fed. R. Civ. P. 60(b). While Rule 55(c) applies to setting aside entries of default and entries of default judgment, Rule 60(b) enables a court to vacate judgments in general. Rule 55(c), however, directs a court to refer to Rule 60(b) when setting aside default judgment, not when setting aside default. See Fed. R. Civ. P. 55(c) ("For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)."). As the First Circuit explained in Coon v. Grenier, 867 F.2d 73 (1st Cir. 1989), Rule 60(b) establishes a more rigorous standard than Rule 55(c), because vacating judgments ought to be more difficult than vacating entries of default. See id. at 76. Because there had been no entry of default judgment, Rule 60(b) is inapplicable. See id.

To find good cause to set aside default, courts look at three factors: (1) whether the default was willful, (2) whether setting default aside would prejudice the adversary,

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magistrate judge because the grant or denial of a request for sanctions constitutes a dispositive matter), and Bennett v. Gen. Caster Serv. of N. Gordon Co., 976 F.2d 995, 997-98 (6th Cir. 1992) (same).

and (3) whether a meritorious defense is presented. See id. at 76 (citing United States v. One Parcel of Real Property, 763 F.2d 181, 183 (5th Cir. 1985)).[5] Defendants' attorneys claim that their three-day belatedness in filing the Motion to Dismiss was a result of employee vacations and innocent oversights within the bureaucracy of the federal government, and the Magistrate Judge found no reason to believe that the Government willfully defaulted. Setting aside default would not have prejudiced Plaintiff because the delay was only three days and the Magistrate Judge found that he had failed to comply with Rule 55(e), which would have negated default judgment. Finally, Defendants' Motion to Dismiss sets forth several meritorious defenses supporting their argument that the Court should dismiss Plaintiff's Complaint. Therefore, this Court finds nothing clearly erroneous or contrary to law in the Magistrate Judge's determination that if default was entered, there was good cause to set it aside.

Second, the Magistrate Judge correctly found that even if default was entered, default judgment was inappropriate because Plaintiff failed to comply with Rule 55(e). See Alameda v. Sec'y of Health, Educ. & Welfare, 622 F.2d 1044, 1047-49 (1st Cir. 1980) (vacating district court's entry of default judgment because plaintiff did not meet requirements of Rule 55(e)). Rule 55(e) states that, "No judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes a claim or right to relief by evidence satisfactory to the court." In this case Defendants include an agency of the United States as well as the secretary of the agency, so Rule 55(e) applies. Not offering any evidence supporting the merits of his claims, Plaintiff only proffers evidence showing that Defendants were three days late in filing

[5] This three-part examination is not a concrete legal analysis, but rather a suggested method of determining whether good cause exists. See Coon, 867 F.2d at 76 ("We do not venture to set forth any precise formula,

their responsive pleadings, which does not satisfy Rule 55(e). See Borzeka v. Heckler, 739 F.2d 444, 446 (9th Cir. 1984) (affirming decision to set aside default judgment because plaintiff only offered proof that United States filed late, but no evidence establishing a claim or right). Therefore, the Court finds no clear error in the Magistrate Judge's determination that Plaintiff was not entitled to default judgment because of his failure to fulfill the criteria of Rule 55(e).[6]

Thus, the September 21st Order, confirming the original September 12th Order, is valid. Plaintiff is not entitled to an entry of default, nor to default judgment. The Court now proceeds to consideration of Defendants' Motion to Dismiss.

III. DEFENDANTS' MOTION TO DISMISS

A. Standard of Review

When deciding whether to dismiss a complaint for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), courts "must construe the complaint liberally, treating all well-pleaded facts as true and indulging all reasonable inferences in favor of the plaintiff." Aversa v. United States, 99 F.3d 1200, 1209-1210 (1st Cir. 1996). This is especially true in cases with a pro se plaintiff. See Ahmed v. Rosenblatt, 118 F.3d 886, 890 (1st Cir. 1997) ("We are required to construe liberally a pro se complaint… However, pro se status does not insulate a party from complying with procedural and substantive law.")

Also, when a court is determining whether it has subject matter jurisdiction over a

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because we recognize that each case must necessarily turn on its own unique circumstances.").

[6] In the event that denial of Rule 55 default judgment is a dipositive matter, the Court has treated the Magistrate Judge's orders of September 12th and September 21st to de novo review. After de novo review, the Court accepts both orders.

claim, "the court may consider whatever evidence has been submitted, such as the depositions and exhibits submitted…" Id. at 1210. "A plaintiff, however, may not rest merely on unsupported conclusions or interpretations of law.… Subjective characterizations or conclusory descriptions of a general scenario which could be dominated by unpleaded facts will not defeat a motion to dismiss." Murphy v. United States, 45 F.3d 520, 522 (1st Cir. 1995) (internal quotations omitted). Furthermore, plaintiffs bear the burden of establishing subject matter jurisdiction. See Aversa, 99 F.3d at 1209; Murphy, 45 F.3d at 522.

B. Discussion

The Government challenges Plaintiff's Complaint by attacking it for lack of subject matter jurisdiction. Federal courts are courts of limited jurisdiction, so they may only hear cases over which they have subject matter jurisdiction. See, e.g., U.S. Const. art. III § 2 cl. 1; Viqueira v. First Bank, 140 F.3d 12, 16 (1st Cir. 1998). An essential element of subject matter jurisdiction is that plaintiffs must demonstrate that they have standing. See Dubois v. United States Dep't of Agric., 102 F.3d 1273, 1281 (1st Cir. 1996). To establish standing,

> [f]irst, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized… and (b) actual or imminent, not conjectural or hypothetical… Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court… Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (internal quotations, citations

and edits omitted).

In the present case, Plaintiff has failed to articulate any factual circumstances of injury. While claiming that numerous regulations and statutory provisions have injured him, Plaintiff does not explain how these allegedly invalid laws have harmed him. Thus, these assertions of injuries are nothing more than "unsupported conclusions" without a foundation in any factual allegations. See Murphy, 45 F.3d at 522. Moreover, Plaintiff does not offer any suggestions as to how a ruling in his favor regarding the constitutionality of these statutory and regulatory provisions would redress his circumstances. Therefore, Plaintiff lacks standing.

Furthermore, by not alleging the who, what, when, where and how of his claim, Plaintiff fails to demonstrate that this Court has subject matter jurisdiction based on a federal question pursuant to 28 U.S.C. § 1331.[7] Although Plaintiff need not invoke the language "federal question" or "section 1331", he still needs to submit sufficient facts to find a basis for subject matter jurisdiction. See In re Mailman Steam Carpet Cleaning Corp.,196 F.3d 1, 5 (1st Cir. 1999) ("Affirmative pleading of the precise statutory basis for federal subject matter jurisdiction is not required as long as a complaint alleges sufficient facts to establish jurisdiction.").

Thus, Plaintiff has failed in meeting his burden of establishing subject matter jurisdiction.

[7] The other basis of subject matter jurisdiction in federal courts is when there is diversity of citizenship between plaintiffs and defendants. Diversity of citizenship, however, does not apply in cases such as this against the United States.

IV. CONCLUSION

For the reasons discussed above, Plaintiff's Motion to Set Aside the Court's Order dated September 21, 2000 is DENIED. Defendant's Motion to Dismiss is GRANTED. Plaintiff's Complaint is DISMISSED WITHOUT PREJUDICE.

SO ORDERED.

GEORGE Z. SINGAL
United States District Judge

Dated this 27th day of October, 2000.

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